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Report of the Working Group on Electronic Commerce on its thirty-ninth session

(New York, 11-15 March 2002)

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I. Introduction

1. At its thirty-third session, in 2000, the United Nations Commission on International Trade Law held a preliminary exchange of views on proposals for future work in the field of electronic commerce. Three topics were suggested as indicating possible areas where work by the Commission would be desirable and feasible. The first dealt with electronic contracting, considered from the perspective of the United Nations Convention on Contracts for the International Sale of Goods (the "United Nations Sales Convention");[1] the second was online dispute settlement; and the third topic was dematerialization of documents of title, in particular in the transport industry.

2. The Commission welcomed the proposal to study further the desirability and feasibility of undertaking future work on those topics. The Commission generally agreed that, upon completing the preparation of the Model Law on Electronic Signatures, the Working Group on Electronic Commerce would be expected to examine, at its thirty-eighth session, some or all of the above-mentioned topics, as well as any additional topic, with a view to making more specific proposals for future work by the Commission at its thirty-fourth session (Vienna, 25 June-13 July 2001). It was agreed that work to be carried out by the Working Group could involve consideration of several topics in parallel as well as preliminary discussion of the contents of possible uniform rules on certain aspects of the above-mentioned topics.[2] The Working Group considered those proposals at its thirty-eighth session, in 2001, on the basis of a set of notes dealing with a possible convention to remove obstacles to electronic commerce in existing international conventions (A/CN.9/WG.IV/WP.89); dematerialization of documents of title (A/CN.9/WG.IV/WP.90); and electronic contracting (A/CN.9/WG.IV/WP.91).

3. The Working Group held an extensive discussion on issues related to electronic contracting (see A/CN.9/484, paras. 94-127). The Working Group concluded its deliberations on future work by recommending to the Commission that work towards the preparation of an international instrument dealing with certain issues in electronic contracting be started on a priority basis. At the same time, it was agreed to recommend to the Commission that the Secretariat be entrusted with the preparation of the necessary studies concerning three other topics consi
Working Group, namely: (a) a compre
of possible legal barriers to the d
electronic commerce in international ins
further study of the issues related to tra
in particular rights in tangible goods,
means and mechanisms for publicizing
record of acts of transfer or the creat
interests in such goods; and (c) a study
UNCITRAL Model Law on Internation
Arbitration, as well as the UNCITRA
Rules, to assess their appropriateness f
specific needs of online arbitration (se
para. 134).

4. At the thirty-fourth session of the C
2001, there was wide support for the rec
made by the Working Group, which
constitute a sound basis for future
Commission. The views varied, howev
the relative priority to be assigned to t
line of thought was that a project aimi
obstacles to electronic commerce
instruments should have priority over th
in particular over the preparation of a ne
instrument dealing with electronic cont
said that references to "writing",
"document" and other similar provisio
uniform law conventions and trade agree
created legal obstacles and generated
international transactions conducted
means. Efforts to remove those obstacle
delayed or neglected by attaching hig
issues of electronic contracting.

5. The prevailing view, however, wa
the order of priority that had been recom
Working Group. It was pointed out, in t
that the preparation of an internatio
dealing with issues of electronic contr
consideration of appropriate ways to re
to electronic commerce in existing
conventions and trade agreements wer
exclusive. The Commission was rei
common understanding reached at
session that work to be carried out b
Group could involve consideration of s
parallel as well as preliminary dis
contents of possible uniform rules on c
the above-mentioned topics.[3]

6. There were also differing views regarding the scope of future work on electronic contracting, as well as the appropriate moment to begin such work. Pursuant to one view, the work should be limited to contracts for the sale of tangible goods. The opposite view, which prevailed in the course of the Commission's deliberations, was that the Working Group should be given a broad mandate to deal with issues of electronic contracting, without narrowing the scope of work from the outset. It was understood, however, that consumer transactions and contracts granting limited use of intellectual property rights would not be dealt with by the Working Group. The Commission took note of the preliminary working assumption made by the Working Group that the form of the instrument to be prepared could be that of a stand-alone convention dealing broadly with the issues of contract formation in electronic commerce (see A/CN.9/484, para. 124), without creating any negative interference with the well-established regime of the United Nations Sales Convention (see A/CN.9/484, para. 95) and without unduly interfering with the law of contract formation in general. Broad support was given to the idea expressed in the context of the thirty-eighth session of the Working Group that, to the extent possible, the treatment of Internet-based sales transactions should not differ from the treatment given to sales transactions conducted by more traditional means (see A/CN.9/484, para. 102).

7. As regards the timing of the work to be undertaken by the Working Group, there was support for commencing consideration of future work without delay during the third quarter of 2001. However, strong views were expressed that it would be preferable for the Working Group to wait until the first quarter of 2002, so as to afford States sufficient time to hold internal consultations. The Commission accepted that suggestion and decided that the first meeting of the Working Group on issues of electronic contracting should take place in the first quarter of 2002.[4]

8. The Working Group on Electronic Commerce, which was composed of all States members of the Commission, held its thirty-ninth session in New York, from 11 to 15 March 2002. The session was attended by representatives of the following States members of the Working Group: Austria, Benin, Brazil, Burkina Faso, Cameroon, Canada, China, Colombia, Fiji, France, Germany, Honduras, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Lithuania, Mexico, Russian Federation, Rwanda, Sierra Leone, Singapore, Spain, Sweden, Thailand, Uganda, United States of America and Uruguay.

9. The session was attended by observers from the following States: Argentina, Australia, Bangladesh, Belgium, Cyprus, Czech Republic, Denmark, Dominican Republic, Finland, Indonesia, Iraq, Ireland, Israel, Malta, New Zealand, Nigeria, Norway, Peru, Philippines, Poland, Portugal, Republic of Korea, Saudi Arabia, Switzerland, Tunisia and Turkey.

10. The session was also attended by observers from the following international organizations: (a) organizations of the United Nations system: United Nations Conference on Trade and Development, World Bank, World Intellectual Property Organization and United Nations Industrial Development Organization; (b) intergovernmental organizations: European Space Agency, Hague Conference on Private International Law, Inter-American Development Bank and Organisation for Economic Cooperation and Development; and (c) non-governmental organizations invited by the Commission: Association of the Bar of the City of New York, International Association of Ports and Harbors, International Chamber of Commerce, International Law Institute, International Union of Marine Insurance, Internet Law and Policy Forum and Union internationale du Notariat.

11. The Working Group elected the following officers:

Chairman: Jeffrey Chan Wah Teck (Singapore)

Rapporteur: André Akam Akam (Cameroon)

12. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.IV/WP.92); (b) note by the Secretariat discussing selected issues on electronic contracting, containing, as its annex I, an initial draft tentatively entitled "Preliminary Draft Convention on [International] Contracts Concluded or Evidenced by Data Messages" (A/CN.9/WG.IV/WP.95); (c) note by the Secretariat transmitting comments that had been formulated by an ad hoc expert group established by the International Chamber of Commerce to examine the issues raised in document A/CN.9/WG.IV/WP.95 and the draft provisions set out in its annex I (A/CN.9/WG.IV/WP.96); (d) note by the Secretariat containing information on the progress made thus far by the Secretariat in connection with the Working Group's

consideration of ways to remove obstacles to electronic commerce in existing international conventions (A/CN.9/WG.IV/WP.94).

13. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Electronic contracting: provisions for a draft convention.
4. Legal barriers to the development of electronic commerce in international instruments relating to international trade.
5. Other business.
6. Adoption of the report.

II. Deliberations and decisions

14. The Working Group reviewed the preliminary draft convention contained in annex I of the note by the Secretariat (A/CN.9/WG.IV/WP.95). The decisions and deliberations of the Working Group with respect to the draft convention are reflected in section III below. The Secretariat was requested to prepare a revised version of the preliminary draft convention, based on those deliberations and decisions for consideration by the Working Group at its fortieth session, tentatively scheduled to take place in Vienna from 14 to 18 October 2002.

15. The Working Group began its deliberation by considering the form and scope of the preliminary draft convention (see paras. 18-40). The Working Group agreed to postpone a discussion on exclusions from the draft convention until it had had an opportunity to consider the provisions related to location of the parties and contract formation. In particular, the Working Group decided to proceed with its deliberations by firstly taking up articles 7 and 14, both of which dealt with issues related to the location of the parties (see paras. 41-65). After it had completed its initial review of those provisions, the Working Group proceeded to consider the provisions dealing with contract formation in articles 8-13 (see paras. 66-121). The Working Group concluded its deliberations on the draft convention with a discussion on draft article 15 (see paras. 122-125). The Working Group agreed that it should consider articles 2-4, dealing with the sphere of application of the draft convention and articles 5 (definitions) and 6 (interpretation) at its fortieth session.

16. The Working Group took note of the progress made thus far by the Secretariat in connection with a survey of possible legal barriers to the development of electronic commerce in international instruments on the basis of a note by the Secretariat containing information on that survey (A/CN.9/WG.IV/WP.94). The Working Group requested the Secretariat to seek the views of member and observer States on the survey and the preliminary conclusions indicated therein and to prepare a report compiling such comments for consideration by the Working Group at a later stage. The Working Group took note of a statement stressing the importance that the survey being conducted by the Secretariat should reflect trade-related instruments emanating from the various geographical regions represented on the Commission. For that purpose, the Working Group requested the Secretariat to seek the views of other international organizations, including organizations of the United Nations system and other intergovernmental organizations, as to whether there were international trade instruments in respect of which those organizations or their member States acted as depositaries that those organizations would wish to be included in the survey being conducted by the Secretariat.

17. The Working Group considered oral reports by the Secretariat on developments concerning online arbitration and on the status of consideration by the Secretariat of issues related to transfer of rights by electronic means, in particular, transfer of rights in tangible goods. The Working Group agreed on the importance of both topics, which should be kept under review by the Secretariat for consideration by the Working Group at an appropriate stage.

III. Electronic contracting: provisions for a draft convention

General comments

18. Before considering the individual provisions for a draft convention on electronic contracting, the Working Group engaged in a general exchange of views

concerning the form and scope of the instrument, its underlying principles and some of its main features.

1. Form of the instrument

19. The Working Group took note of the fact that the form of a preliminary draft of an international convention dealing with issues of electronic contracting had been chosen so as to reflect a preliminary working assumption made by the Working Group, of which the Commission had taken note at its thirty-fourth session, in 2001, namely, that the form of the instrument to be prepared could be that of a stand-alone convention dealing broadly with issues of contract formation in electronic commerce (see A/CN.9/484, para. 124).

20. The Working Group heard various statements in support of preparing an international convention dealing with issues of electronic contracting, which was said to be best suited to ensure the degree of uniformity and legal certainty required by international trade transactions. While the view was also expressed that it would instead be preferable to prepare a non-binding instrument, such as recommendations on guidelines on electronic contracting, the Working Group maintained its preliminary working assumption that it should focus on the preparation of a stand-alone convention. The Working Group was agreed that its working assumption would be without prejudice to a final decision, at an appropriate stage, concerning the form of the instrument under consideration. A widely shared view, in that connection, was that the Working Group should keep a flexible approach to the question of the form of the instrument until it had considered in more detail the scope of the instrument and its substantive provisions.

2. Scope of the instrument

21. The Working Group heard expressions of support for a proposal that its work should not be limited to electronic contracts, but should apply to commercial contracts in general, irrespective of the means used in their negotiation. It was suggested that the main objective of the Commission's work should be to eliminate legal barriers to international transactions that generally resulted from international disharmony of contract law. Disharmony in the area of contract formation, however, was not specific to electronic contracts. With a few exceptions (such as contracts for the sale of goods, which benefited from the harmonized regime established by the United Nations Sales Convention), the formation of most international commercial contracts was not subject to widely accepted uniform legislative regimes.

22. The Working Group heard various arguments for not regulating electronic contracts separately from commercial contracts in general. It was said that the preparation of an instrument dealing specifically with issues related to electronic contracting carried with it the risk of establishing a duality of regimes depending on the means used for contract formation. The result might be that a contract other than, for example, a sales contract governed by the United Nations Sales Convention would benefit from an internationally harmonized regime when it was concluded by electronic means but not if it was concluded by other means, such as by paper-based communications.

23. The Working Group was sympathetic to the arguments put forward in favour of broadening the scope of the draft convention so as to deal generally with issues of contract formation irrespective of the means used by the parties for negotiating their contracts. The prevailing view within the Working Group, however, was that it might be overly ambitious, at the current stage, to engage in harmonizing contract law in general. It was pointed out that the mandate of the Working Group was limited to issues of electronic contracting and that expanding the scope of the work would require further consideration by the Commission of the feasibility of achieving international consensus on broad issues of contract formation (for further discussion on this matter, see paras. 68-70). The practical importance of working on electronic contracting was also emphasized. If contracts concluded by electronic means were not fundamentally different from contracts concluded by other means, they posed a number of practical questions that required specific attention.

24. Having agreed that its work should focus on issues related to electronic contracting, the Working Group proceeded to consider other general comments relating to the scope of the draft convention. Those general comments were essentially concerned with the following issues: the notion of "electronic contracting"; whether the draft convention should be limited to issues of contract formation or whether it could deal with certain issues of contract performance;

whether the draft convention should deal only with commercial contracts or whether it should also cover transactions involving consumers; whether the draft convention should deal only with international contracts or whether it should apply without distinction to both domestic and international transactions.

25. The Working Group took note of the general comments made on those issues and decided to revert to them when considering the provisions dealing with the sphere of application of the draft convention at its fortieth session.

3. Underlying principles

26. It was widely agreed that the draft convention should give full recognition to the principles of freedom of contract and party autonomy, which were recognized in various texts that had been prepared by the Commission, such as the United Nations Sales Convention.

27. The Working Group noted that its work on electronic contracting was evolving against the background of earlier instruments that had been prepared by the Commission, in particular the United Nations Sales Convention and the UNCITRAL Model Laws on Electronic Commerce and Electronic Signatures. While every effort should be made to avoid interfering unduly with the legal regime established by those instruments, in particular the United Nations Sales Convention, the Working Group took note of the suggestion that its work on electronic contracting might require formulating specific solutions for issues not dealt with in those earlier instruments or adapting some of the provisions of those instruments, in particular the model laws, to the current context.

Article 1. Scope of application

28. The text of the draft article read as follows:

Variant A

"1. This Convention applies to contracts concluded or evidenced by means of data messages.

"2. Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

"[3. A State may declare that it will apply this Convention only to contracts concluded between parties having their places of business in different States or [when the rules of private international law lead to the application of the law of a Contracting State or] when the parties have agreed that it applies.]

"[4. Where a State makes a declaration pursuant to paragraph 3, the fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.]"

Variant B

"1. This Convention applies to international contracts concluded or evidenced by means of data messages.

"2. For the purposes of this Convention a contract is considered international if, at the time of the conclusion of the contract, the parties have their places of business in different States.

"3. This Convention also applies [when the rules of private international law lead to the application of the law of a Contracting State or] when the parties have agreed that it applies.

"[4. The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.]

"5. [Neither] The nationality of the parties [nor the civil or commercial character of the parties or of the contract] is [not] to be taken into consideration in determining the application of this Convention."

Choice between variants A and B

29. The Working Group noted that the fundamental difference between variants A and B was that variant A made the draft convention applicable, in principle, to any contract "concluded or evidenced by means of data messages", without distinction between domestic and

international contracts, whereas variant B made the draft convention applicable only to "international" contracts. The Working Group thus proceeded to consider which of the two approaches should be used to define the geographical sphere of application of the draft convention.

30. In favour of the approach embodied in variant A, it was said that parties communicating through electronic means might not always know in advance the location of their counterparts' places of business. Thus, making the application of the draft convention dependent upon whether the parties were located in different States might reduce the benefit of legal certainty and predictability that the draft convention sought to provide. It was also suggested that the provisions of the draft convention might also be relevant to purely domestic transactions, since they dealt with issues that arose in connection with most distance contracts and not exclusively in connection with international contracts.

31. The prevailing view within the Working Group, however, was that the draft convention should be limited to international contracts so as not to interfere with domestic law. Such a limitation was desirable in order to ensure consistency with the approach taken in most of the instruments that had been prepared thus far by the Commission.

32. Having agreed on retaining variant B as its working assumption, the Working Group proceeded to consider its individual provisions.

Paragraph 1

33. Several questions were raised concerning the meaning of the phrase "contracts concluded or evidenced by means of data messages" and its appropriateness to describe the substantive field of application of the draft convention.

34. It was pointed out that it was potentially misleading to state that the draft convention "applied to contracts" since its provisions only dealt with certain issues related to the use of data messages, in particular in the context of contract formation. The formulation of paragraph 1 was also criticized as being too restrictive and not in accordance with the principle of media neutrality, since, in practice, many contracts were concluded by a mixture of oral conversations, telefaxes, paper contracts, electronic mail (e-mail) and web communication. If the provision was read as applying only to contracts concluded exclusively by means of data messages, it might cause an undesirable limitation in the field of application of the draft convention. In turn, if paragraph 1 was also intended to cover contracts formed by a combination of means, including data messages, it should be reformulated so as to avoid questions as to the extent to which data messages needed to be used in order to trigger the application of the draft convention.

35. Furthermore, it was pointed out that practical use of data messages was not confined to the context of contract formation, as data messages were used for the exercise of a variety of rights arising out of the contract (such as notices of receipt of goods, notices of claims for failure to perform or notices of termination) or even for performance, as in the case of electronic fund transfers. As currently drafted, paragraph 1 was felt to be too narrow, thus depriving all electronic communications used in commercial transactions other than for purposes of contract formation of the benefits of legal certainty that the draft convention was intended to achieve.

36. Having considered the various comments that had been made, the Working Group agreed that the definition of the substantive field of application should be revised by focusing on the use of data messages in the context of commercial transactions, as was the case of article 1 of the UNCITRAL Model Law on Electronic Commerce, rather than on "contracts concluded by data messages".

Paragraph 2

37. It was noted that the United Nations Sales Convention only applied to international contracts if both parties were located in contracting States of the Convention. In order to ensure consistency between the two texts, it was suggested that similar wording should be used in the draft paragraph. It was agreed that a future version of the draft paragraph would offer an additional phrase reflecting that suggestion, for future consideration by the Working Group.

Paragraph 3

38. It was suggested that the words "when the rules of private international law lead to the application of the law of a Contracting State", which appeared in square brackets, should be deleted since they might

cause an expansion of the scope of application of the draft convention beyond what was initially contemplated by the Working Group. It was suggested that such expansion, owing to its inherent ex post facto nature, would significantly reduce certainty at the time of contracting. The initial reaction of the Working Group was that the proposal needed to be considered further, since the phrase in question also appeared in article 1, subparagraph (b), of the United Nations Sales Convention, and the majority of States that had adhered to the Convention had not excluded the application of that provision, as authorized by article 95 of the Convention.

39. The Working Group took note of the views that had been expressed. It was agreed that the matter might require further consideration by the Working Group when considering a revised version of the draft convention.

Paragraphs 4 and 5

40. In order to ensure consistency between the two texts, it was agreed that the language in paragraphs 4 and 5 of the draft convention should be aligned with the corresponding language in article 1, paragraphs 2 and 3, of the United Nations Sales Convention and that the square brackets around paragraph 4 and within paragraph 5, where appropriate for that purpose, should be removed.

Article 7. Location of the parties

41. The draft article, as considered by the Working Group, read as follows:

"1. For the purposes of this Convention, a party is presumed to have its place of business at the geographic location indicated by it in accordance with article 14 [, unless it is manifest and clear that the party does not have a place of business at such location and that such indication is made solely to trigger or avoid the application of this Convention].

"2. If a party has more than one place of business, the place of business for the purposes of this Convention is that which has the closest relationship to the relevant contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.

"3. If a natural person does not have a place of business, reference is to be made to the person's habitual residence.

"4. The location of the equipment and technology supporting an information system used by a legal entity for the conclusion of a contract, or the place from which such information system may be accessed by other persons, in and of themselves, do not constitute a place of business [, unless such legal entity does not have a place of business].

"5. The sole fact that a person makes use of a domain name or electronic mail address connected to a specific country does not create a presumption that its place of business is located in such country."

42. As a general comment, it was noted that the purpose of the draft article was to offer elements that allowed the parties to ascertain the location of the places of business of their counterparts, thus facilitating a determination, among other elements, as to the international or domestic character of a transaction and the place of contract formation. As such, the draft article was one of the central provisions in the preliminary draft convention and one that might be essential, if the sphere of application of the preliminary draft convention was defined along the lines of variant B of draft article 1.

Paragraph 1

43. It was pointed out that draft paragraph 1 built upon a proposal that had been made at the thirty-eighth session of the Working Group, to the effect that the parties in electronic transactions should have the duty to disclose their places of business (see A/CN.9/484, para. 103). That duty was reflected in draft article 14, paragraph 1 (b). It was also pointed out that, in line with the spirit of the Working Group's consideration of this matter at its thirty-eighth session (see A/CN.9/484, paras. 96-104), draft paragraph 1 was not intended to create a new concept of "place of business".

44. The Working Group noted that considerable legal uncertainty was caused at present by the difficulty of determining where a party to an online transaction was located. While that danger had always existed, the global reach of electronic commerce had made it more difficult than ever to determine location. That

uncertainty, it was also noted, could have significant legal consequences, since the location of the parties was important for issues such as jurisdiction, applicable law and enforcement. Accordingly, there was wide agreement within the Working Group as to the need for provisions that facilitated a determination by the parties of the places of business of the persons or entities they had commercial dealings with. The views differed, however, as to whether a provision along the lines of the draft paragraph offered an adequate solution to meet that need.

45. Pursuant to one view, the draft paragraph was not needed since the definition of "place of business" in draft article 5 already provided the elements that allowed the parties to ascertain each other's places of business. The prevailing view, however, was that the elements used in the definition of "place of business" might not be apparent to the parties solely on the basis of their communications and that further elements should be offered, in particular a provision that enabled the parties to rely on representations made to them in the course of their dealings and attached certain legal consequences to those representations.

46. It was noted that, for that purpose, the draft paragraph created a presumption that a party was located at the place stated by it to be its place of business pursuant to article 14. That formulation was criticized, however, as being excessively narrow, since the latter provision only required parties offering goods or services through an information system that was generally accessible to the public to make available certain information, including an indication of its place of business, to parties accessing such information system. It was suggested that the draft paragraph should be broadened so as to cover all parties to transactions falling under the convention and not only those which offered services through open systems such as the Internet. A widely shared view in that connection was that an indication of the place of business for the purposes of draft article 7 should also be contemplated for parties offering goods or services through systems other than generally accessible communications systems, as well as for parties ordering goods or services through both types of system.

47. Pursuant to another view, the essential difficulty raised by the draft paragraph was that, by establishing a rebuttable presumption concerning a party's location, the draft provision exacerbated, rather than reduced, legal uncertainty in electronic transactions. It was said that the possibility of adducing evidence that a party was located at a place other than the place of business it had indicated might give opportunity for protracted litigation concerning the applicability of the draft convention. In order to overcome those difficulties, it was suggested that the draft paragraph should facilitate a positive determination of the parties' places of business by providing that they should be deemed to be located at the places indicated by them as their places of business. The Working Group took note of that suggestion and expressed its sympathy for the concerns it intended to address. The prevailing view, however, was that it was preferable to retain the formulation of the draft paragraph as a rebuttable presumption. It was felt that it would be undesirable to create the impression that the draft convention upheld an indication of a place of business by a party even where such an indication was inaccurate or intentionally false.

48. The Working Group proceeded to consider the conditions under which the presumption established by the draft paragraph might be rebutted. Pursuant to one view, which received expressions of strong support, the clause within square brackets in the draft paragraph was not needed and should be deleted with a view to enhancing legal certainty in the interpretation of the draft paragraph. In particular the last phrase within square brackets ("and such indication is made solely to trigger or avoid the application of this Convention") was said to be of questionable usefulness, as the parties were in any event free, under draft article 1, paragraph 3, to agree to the application of the draft convention, or to exclude its application, under draft article 4. Moreover, it was suggested that trading partners acting in good faith would normally be expected to provide accurate and truthful information concerning the location of their places of business. The legal consequences of false or inaccurate representations made by them were not primarily a matter of contract formation, but rather a matter of criminal or tort law. To the extent that those questions were dealt with in most legal systems, they would be governed by the applicable law outside the draft convention.

49. The countervailing view, which was also widely shared, was that it was important to include in the draft paragraph a provision allowing the parties or the court to disregard a representation made by one party when

such representation was manifestly inaccurate or untruthful. It was said that such a provision was not intended to establish any form of criminal liability or liability in tort but merely to prevent situations where a party might benefit from making recklessly inaccurate or untruthful representations. The provision, it was further said, could not be regarded as giving rise to legal uncertainty, in view of the high standard required to rebut the presumption of paragraph 1. The views varied, however, as to whether the clause within square brackets should be entirely retained, as suggested by some, or limited only to the first phrase ("unless it is manifest and clear that the party does not have a place of business at such location"), as proposed by others. A third suggestion was that the two phrases should not be kept as cumulative conditions, in view of the great difficulty of demonstrating that it was both "manifest and clear" that a party did not have its place of business at a certain location and that its indication of a place of business had been made solely for the purposes of triggering or avoiding the application of the convention.

50. Having considered the various comments that had been made, the Working Group generally felt that it should consider further the provisions dealing with the location of the parties and that, for that purpose, the various elements currently contained in the draft paragraph could be tentatively retained. The Secretariat was requested to prepare a revised version that took into account the various views that had been expressed, including the deliberations of the Working Group on the remainder of the draft article (see paras. 51-59), as well as on article 14 (see paras. 60-65). In preparing such a revised version, the Secretariat should attempt to reformulate the draft paragraph as a general provision that offered an initial presumption of the parties' location, based on their indication of their places of business, which should be followed by appropriate fall-back provisions in the absence of such an indication or in the event that the presumption could not be relied upon.

Paragraph 2

51. The view was expressed that the draft paragraph, which was based upon article 10, subparagraph (a), of the United Nations Sales Convention, might not be appropriate in an instrument that was not restricted to sales contracts. It was pointed out, in that connection, that the cumulative reference to a place of business that had "the closest relationship to the contract and its performance" had given rise to uncertainty, since there might be situations where a given place of business of one of the parties was more closely connected to the contract, but another of that party's places of business was more closely connected to the performance of the contract. Those situations were not rare in connection with contracts entered into by large multinational companies and might become even more frequent as a result of the current trend towards increased decentralization of business activities. It was therefore suggested that the draft paragraph might need to be reformulated.

52. That suggestion was objected to on the grounds that its adoption might lead to a departure from the text of the United Nations Sales Convention, as a result that should be generally avoided by the Working Group. Inconsistencies between the two instruments were said to be particularly undesirable in view of the risk of introducing a duality of regimes for sales transactions depending on the means used for their negotiation.

53. In response to those objections it was said that the Working Group should not generally exclude the possibility of using new criteria for determining a party's place of business or for improving upon the criteria that had been used in the United Nations Sales Convention. It was suggested that other criteria, potentially more suited to the needs of electronic commerce, had been developed since the adoption of the United Nations Sales Convention. Those additional criteria might include elements such as the place of an entity's organization or its place of incorporation.

54. The Working Group considered at length the different views that had been expressed and agreed that the matter required further study. It was also agreed that, while retaining the draft paragraph, the Working Group could explore using supplementary elements to the criteria used in the draft paragraph, possibly by expanding the definitions of "place of business" contained in draft article 5. It was noted that such an approach would not be inconsistent with the United Nations Sales Convention since the latter did not provide a definition of the expression "place of business".

Paragraph 3

55. Apart from drafting comments and subject to the Working Group's tentative conclusions with regard to

the structure of the entire draft article 7, the draft paragraph was generally felt to be acceptable.

Paragraphs 4 and 5

56. The Working Group noted that, unlike the previous draft paragraphs, which offered positive indications of matters to be taken into account when determining a party's place of business, the two draft paragraphs mentioned elements what would not, in and of themselves, provide a firm indication of a party's place of business.

57. The Working Group considered a number of questions that were raised concerning the meaning of, and need for, the two draft paragraphs. In connection with paragraph 5, the view was expressed that the phrase within square brackets was not needed and should be deleted since most business entities could normally be expected to possess one or more of the elements of the sequence of fall-back solutions that a revised version of draft article 7 should offer to ascertain the location of a party's "place of business". The countervailing view was that it might be useful for the Working Group to study further the issues raised by the draft paragraph in the light of practical developments concerning the manner in which entities offering goods or services online organized their business. One situation that might need to be addressed in draft paragraph 4, possibly by combining it with paragraph 5, it was said, related to offers of goods or services by direct electronic mailing to a target audience through a web portal made available by a third party, such as a web host.

58. The view was expressed that draft paragraph 5 was not needed and should be deleted. In some countries, it was said, the assignment of domain names was only made after verification of the accuracy of the information provided by the applicant, including its location in the country to which the relevant domain name related. For those countries, it might be appropriate to rely, at least in part, on domain names for the purpose of article 7, contrary to what was suggested in the draft paragraph. For countries where such verification was not made, the rule might be seen as superfluous and might therefore be deleted. In practice, it was further said, there might be only few, if any, entities whose places of business would need to be arrived at on the basis of domain names alone.

59. Having considered the various views that had been expressed, the Working Group decided to retain, for further consideration, the elements mentioned in draft paragraphs 4 and 5, including the language in square brackets in draft paragraph 4. The Working Group agreed to consider, at a later stage, whether the two provisions might be usefully combined into one single paragraph.

Article 14. General information to be provided by the parties

60. The text of the draft article, as considered by the Working Group, read as follows:

"1. A party offering goods or services through an information system that is generally accessible to the public shall render the following information available to parties accessing such information system:

"(a) Its name and, where the party is registered in a trade or similar public register, the trade register in which the party is entered and its registration number, or equivalent means of identification in that register;

"(b) The geographic location and address at which the party has its place of business;

"(c) Details, including its electronic mail address, which allow the party to be contacted rapidly and communicated with in a direct and effective manner.

"2. A party offering goods or services through an information system that is generally accessible to the public shall ensure that the information required to be provided under paragraph 1 is easily, directly and permanently accessible to parties accessing the information system."

61. The Working Group noted that the draft article was intended to enhance certainty and clarity in international transactions by ensuring that a party offering goods or services through open networks, such as the Internet, should offer at least information on its identity, legal status, location and address. It was pointed out that the draft article reflected the proposal, which had been positively received at the Working Group's thirty-eighth session, that persons and companies making use of such open networks should at least disclose their places of business (see A/CN.9/484, para. 103).

62. There was general agreement within the Working Group that certainty in international transactions conducted by electronic means might benefit from international rules and standards that encouraged parties to disclose their location, among other elements. Views differed, however, as to whether the draft convention was the appropriate instrument for providing such a rule, as well as on the appropriateness of the draft article for that purpose.

63. Pursuant to one view, which was widely shared, obligations to disclose certain information would be more appropriately placed in international industry standards or guidelines, rather than in an international convention dealing with electronic contracting. Another possible source of rules of that nature might be domestic regulatory regimes governing the provision of online services, especially under consumer protection regulations. The inclusion of rules along the lines of the draft article was regarded as particularly problematic in the draft convention since the text did not provide for the consequences that might flow from failure by a party to comply with the disclosure requirements contemplated in the draft article. On the one hand, rendering commercial contracts invalid or unenforceable for failure to comply with the draft article was said to be an undesirable and unreasonably intrusive solution. On the other hand, providing for other types of sanctions, such as tort liability or administrative sanctions, was said to be clearly outside the scope of the draft convention.

64. The countervailing view, which also received strong support, was that the draft article was useful to help the parties determine whether a particular transaction would be regarded as domestic or international and to take measures necessary to protect their rights, in particular in the event of disputes or litigation. The draft article, it was said, could not be seen as excessively intrusive and did not impose an unreasonable burden on business entities, since the information contemplated therein was of a general nature and not concerned with a company's internal affairs.

65. Having considered the various views that had been expressed, the Working Group felt that the substance of the draft article, possibly within square brackets, should be retained for further consideration by it at a later stage. In that connection, it was agreed that the addressees of the disclosure obligations in the draft article should be redefined in accordance with the Working Group's deliberations on draft article 7, paragraph 1 (see paras. 43-50). It was further agreed that some of the concerns that had been expressed in connection with the draft article might be addressed if the relationship between the draft article and draft article 7, paragraph 1, could be clarified in a revised version of the draft article. The Secretariat was requested to prepare such a revised draft taking into account the comments that had been made in the course of the Working Group's deliberations.

Article 8. Time of contract formation

66. The text of the draft article, as considered by the Working Group, read as as follows:

"1. A contract is concluded at the moment when the acceptance of an offer becomes effective in accordance with the provisions of this Convention.

"2. An offer becomes effective when it is received by the offeree.

"3. An acceptance of an offer becomes effective at the moment the indication of assent is received by the offeror."

General remarks

67. It was explained, at the outset, that draft article 8 was intended to reflect the essence of the rules on contract formation contained, respectively, in articles 23, 15, paragraph 1, and 18, paragraph 2, of the United Nations Sales Convention. The verb "reach", which was used in the United Nations Sales Convention, had been replaced with the verb "receive" in the draft article so as to align it with draft article 11, which was based on article 15 of the UNCITRAL Model Law on Electronic Commerce.

68. It was observed that the scope of the rules embodied in draft article 8 went beyond electronic contracting to cover the time when any form of a contractual offer or acceptance would become effective. Diverging views were expressed regarding the scope and nature of the legal issues linked to contract formation that should be dealt with in the draft instrument. One view was that the provision should be broadened beyond determining when an offer or an acceptance became "effective" to discuss such issues as the legal regime of withdrawal, revocation or modification of an offer or acceptance, the place of

contract formation, issues of contracts concluded by conduct and, more generally, all the issues dealt with in articles 14-24 (Part II) of the United Nations Sales Convention. Strong support was expressed in favour of that view. It was pointed out that practitioners of international trade transactions would regard it as particularly desirable and timely to be able to rely on a set of uniform legal provisions regarding those issues upon which the various domestic laws in existence offered little harmony.

69. The opposing view was that draft article 8 should be deleted since it did not specifically address the issues of electronic contracting to which the draft instrument should confine itself. Strong support was expressed in favour of the view that, even if the provisions contained in draft article 8 were redrafted so as to be limited in scope to electronic commerce transactions, they should still be deleted to avoid the creation of a dual regime where different rules would govern the time of formation of an electronic commerce contract within the draft instrument and the time of formation of other types of contract outside the purview of the draft instrument. As to the determination of the time of contract formation, it was stated that the issue was adequately dealt with by draft article 11. Also in favour of deletion of draft article 8, it was stated that no attempt should be made to provide a rule on the time of contract formation that deviated from the substance of the United Nations Sales Convention. In that context, it was pointed out that replacing the verb "reach" with the verb "receive" might lead to unforeseen consequences, for example regarding the compatibility with the draft instrument of domestic laws under which a contract would typically be formed when the offeror became aware of the acceptance of the offer (a theory known as contract formation through "information" of the offeror, as opposed to the mere "receipt" of the acceptance by the offeror). It was pointed out in response that the purpose of draft article 8 was not to deviate from the regime established under the United Nations Sales Convention but merely to provide a synthesis of its most essential provisions regarding contract formation.

70. The Working Group maintained its working assumption that it should limit itself to dealing with the use of data messages in the context of international commercial contracting. In view of the support expressed for the preparation of an instrument dealing broadly with the issues of contract formation, it was observed that the Commission at its forthcoming session might wish to discuss the desirability and feasibility of preparing such an instrument.

Paragraph 1

71. In the continuation of its deliberations, the Working Group focused on the individual paragraphs of draft article 8. Strong support was expressed in favour of retaining paragraph 1, which was described as an essential provision in that draft article and its only substantive addition to the text of the UNCITRAL Model Law on Electronic Commerce. Equally strong support was expressed in favour of deletion of the draft paragraph on the assumption that no interference should be made with the general law applicable outside the draft instrument regarding the time of contract formation. The prevailing view was that paragraph 1 should be replaced with a provision along the lines of draft article 10. As to the notion that a contract would be formed upon receipt of the acceptance, it was agreed that it could be reflected in the other paragraphs of draft article 8, for example in paragraph 3. At the close of the discussion, the view was reiterated that language drawn from draft article 10 was insufficient to provide the guidance and harmonization expected by practitioners as to how contracts were concluded.

Paragraphs 2 and 3

72. General agreement was expressed with respect to the substance of paragraphs 2 and 3. As a matter of drafting, it was widely felt that, since offer and acceptance were abstract notions and the purpose of paragraphs 2 and 3 was to solve the difficulty of determining a point in time at which the intent of the parties expressed by way of data messages would become effective as offer or acceptance, paragraphs 2 and 3 should refer to the specific medium or instrument through which the parties' intent would be manifested. Accordingly, paragraph 2 should be redrafted along the lines of: "An offer in the form of a data message becomes effective when the data message is received by the offeree." Paragraph 3 should read along the lines of: "When expressed in the form of a data message, an acceptance of an offer becomes effective at the moment the data message is received by the offeror."

73. The view was reiterated that, in order not to deviate or run the risk of being interpreted differently

from the text of the United Nations Sales Convention, draft article 8 should reproduce the remainder of Part II of that Convention. The Working Group took note of that view.

Article 9. Invitations to make offers

74. The text of the draft article, as considered by the Working Group, read as follows:

"1. A proposal for concluding a contract which is not addressed to one or more specific persons, but is generally accessible to persons making use of information systems, such as the offer of goods and services through an Internet web site, is to be considered merely as an invitation to make offers, unless it indicates the intention of the offeror to be bound in case of acceptance.

"2. In determining the intent of a party to be bound in case of acceptance, due consideration is to be given to all relevant circumstances of the case. Unless otherwise indicated by the offeror, the offer of goods or services through automated computer systems allowing the contract to be concluded automatically and without human intervention is presumed to indicate the intention of the offeror to be bound in case of acceptance."

75. The Working Group noted that the draft article, which was inspired by article 14, paragraph 1, of the United Nations Sales Convention, was intended to clarify an issue that had raised a considerable amount of discussion since the advent of the Internet, namely the extent to which parties offering goods or services through open, generally accessible communication systems, such as an Internet web site, were bound by advertisements made on their web site.

Paragraph 1

76. There was general support within the Working Group for the policy underlying the draft paragraph. It was noted that, in a paper-based environment, advertisements in newspapers, radio and television, catalogues, brochures, price lists or other means not addressed to one or more specific persons, but generally accessible to the public, were generally regarded as invitations to submit offers (according to some legal writers, even in those cases where they were directed to a specific group of customers), since in such cases the intention to be bound was considered to be lacking. By the same token, the mere display of goods in shop windows and on self-service shelves was usually regarded as an invitation to submit offers. That solution was the result of the application of article 14, paragraph 2, of the United Nations Sales Convention, which provided that a proposal other than one addressed to one or more specific persons was to be considered as merely an invitation to make offers, unless the contrary was clearly indicated by the person making the proposal.

77. The Working Group was of the view that, in keeping with the principle of media neutrality, the solution for online transactions should not be different from the solution used for equivalent situations in a paper-based environment. The Working Group was therefore agreed that, as a general rule, a company that advertised its goods or services on the Internet or through other open networks should be considered as merely inviting those who accessed the site to make offers. Thus, an offer of goods or services through the Internet would not prima facie constitute a binding offer.

78. Having essentially approved the substance of the draft paragraph, the Working Group considered proposals for clarifying further its scope of application. Consistent with its earlier decisions on focusing on issues particularly related to the use of data messages for electronic transactions, the Working Group agreed that the draft paragraph should be reformulated so as to avoid the impression that it contained a general rule on contract formation.

Paragraph 2

79. In response to a question it was noted that the first sentence of the draft paragraph reproduced some but not all of the elements of the rules on interpretation of statements and conduct of the parties that were contained in article 8 of the United Nations Sales Convention. It was suggested, in that connection, that, while there might be reasons for not reproducing the entirety of article 8 of the United Nations Sales Convention in the narrower context of the draft paragraph, it might be preferable to delete the first sentence of the draft paragraph so as to avoid uncertainty as to the relationship between the draft convention and the United Nations Sales Convention.

80. The Working Group noted that the second sentence of the draft paragraph established a

presumption whereby a party offering goods or services through a web site that used interactive applications enabling negotiation and immediate processing of purchase orders for goods or services might be regarded as making a binding offer, unless it clearly indicated its intention not to be bound. That presumption was the object of both support and criticism within the Working Group.

81. Arguments in favour of the presumption underscored the belief that the draft provision helped enhance legal certainty in international transactions. It was stated that parties acting upon offers of goods or services made through the types of system contemplated in the draft paragraph might be led to assume that offers made through such systems were firm offers and that by placing an order they might be validly concluding a binding contract at that point in time. Those parties, it was said, should be able to rely on such a reasonable assumption in view of the potentially significant economic consequences of contract frustration, in particular in connection with purchase orders for securities, commodities or other items with highly fluctuating prices. A rule similar to the one contained in the draft paragraph, it was further said, might help enhance transparency in trading practices by encouraging business entities to state clearly whether or not they accepted to be bound by acceptance of offers of goods or services or whether they were only extending invitations to make offers.

82. The countervailing view was that the rules contained in the draft paragraph might give rise to various difficulties in its interpretation and application. A presumption of the type contemplated in the draft paragraph might have serious consequences for the offeror holding a limited stock of certain goods if it were to be liable to fulfil all purchase orders received from a potentially unlimited number of buyers. It was pointed out that, in order to avert that risk, entities offering goods or services through a web site that used interactive applications enabling negotiation and immediate processing of purchase orders for goods or services frequently indicated in their web sites that they were not bound by those offers. If that was already the case in practice, it would be questionable for the Working Group to reverse that situation in the draft provision. Furthermore, it was said that the party placing an order might have no means of ascertaining how the order would be processed and whether it was in fact dealing with "automated computer systems allowing the contract to be concluded automatically" or whether other actions, by human intervention or through the use of other equipment, might be required in order to effectively conclude a contract or process an order. The formulation in the draft paragraph was further criticized because the words "allowing the contract to be concluded automatically", which appeared to assume that a valid contract had been concluded, were felt to be misleading in a context dealing with actions that might lead to contract formation.

83. The Working Group considered at length the various views that had been expressed and agreed that the matters raised by the draft paragraph required further consideration by the Working Group. In order to advance its future review of the matter, the Working Group requested the Secretariat to prepare a revised draft of paragraph 2 that contained two alternative options for the presumption in question: one confirming the binding character of the offers contemplated in that provision and another treating them as invitations to make offers.

84. The Secretariat was further requested to prepare another variant of the entire draft paragraph that should be drawn essentially from a combination of elements of paragraph 1 and the second sentence of paragraph 2, in which the offer of goods or services through web sites using interactive applications would be presented as an illustration of situations involving only an invitation to make offers.

85. In reformulating the draft paragraph, the Secretariat was requested to ensure that the text was focused on issues of electronic contracting and avoid unnecessary repetition of language drawn from the United Nations Sales Convention.

Article 10. Use of data messages in contract formation

86. The text of the draft article, as considered by the Working Group, read as follows:

"1. Unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages [or other actions communicated electronically in a manner that is intended to express the offer or acceptance, including, but not limited to, touching or clicking on a designated icon or place on a computer screen].

"2. Where data messages are used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that data messages were used for that purpose."

87. The Working Group noted that, as a result of its deliberations on draft article 8, the rules contained in the draft article might need to be reformulated and, at least in part, combined with the current draft article 8 (see paras. 66-73). Without prejudice to those deliberations, the Working Group proceeded to consider the substance of the draft article.

Paragraph 1

88. The Working Group noted that the rules contained in the draft article were based on article 11, paragraph 1, of the UNCITRAL Model Law on Electronic Commerce. The phrase "or other actions communicated electronically", and the reference, for illustrative purposes, to "touching or clicking on a designated icon or place on a computer screen", it was said, were intended to clarify, rather than expand the scope of the rule contained in the Model Law.

89. In connection with the sentence in square brackets, the view was expressed that the illustrative reference to indication of assent by "touching or clicking on a designated icon or place on a computer screen" was not consistent with the principle of technological neutrality and that it carried the risk of being incomplete or becoming dated, as other means of indicating assent not expressly mentioned therein might already be in use or might possibly become widely used in the future. Thus, it was suggested that those words should be deleted from the draft paragraph. An alternative proposal, in that respect, was that the phrase in question be added to the definition of "data messages" in draft article 5, if such illustration was deemed to be useful. The prevailing view within the Working Group, however, was that any of the actions mentioned in that phrase would in fact generate a data message, and that, given the broad meaning of the latter expression in the draft convention, the proposed illustrative addition was not needed in the text of the draft convention. The same conclusion, it was said, might apply to the remainder of the sentence in square brackets.

Paragraph 2

90. A suggestion was made that the draft paragraph was excessively narrow in scope, since it applied only to data messages used in the context of contract formation. It was proposed that the draft paragraph be expanded so as to encompass other messages that might be used in the context of the performance or the termination of a contract. That proposal was objected to on the grounds that there might be situations where domestic law might require certain notices related to contract formation or termination to be made in writing. An example of such requirements might be notices of termination of loan agreement, which, pursuant to rules on debtor protection of some jurisdictions, were not admissible in any form other than a notice written on paper. An international convention such as the one under consideration, it was said, should not interfere with the operation of those rules of domestic law.

91. A proposal was made that the rule contained in the draft paragraph be qualified by a clause indicating that the draft paragraph was subject to draft article 13, which referred to requirements of written form imposed by the law. In response to that proposal it was pointed out that the draft paragraph contained a non-discrimination rule of paramount importance to remove legal obstacles to the use of data messages and that it was essential, in that respect, to reproduce faithfully the substance of the relevant portion of article 11 of the UNCITRAL Model Law on Electronic Commerce, without suggesting a subordination to possible requirements of written form.

92. Having considered both the proposed expansion and qualification to the draft paragraph, as well as the objections thereto, the Working Group agreed, for the time being, to retain the scope of the draft paragraph as currently formulated until it had fully considered the scope of application of the draft convention, in particular the exclusions under draft article 2 at its fortieth session (see para. 15).

Article 11. Time and place of dispatch and receipt of data messages

93. The text of the draft article, as considered by the Working Group, read as follows:

"1. Unless otherwise agreed by the parties, the dispatch of a data message occurs when it enters an

information system outside the control of the originator or of the person who sent the data message on behalf of the originator.

"2. Unless otherwise agreed by the parties, if the addressee has designated an information system for the purpose of receiving data messages, the data message is deemed to be received at the time when it enters the designated information system; if the data message is sent to an information system of the addressee that is not the designated information system, [the data message is deemed to be received] at the time when the data message is retrieved by the addressee. If the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee.

"3. Paragraph 2 of this article applies notwithstanding that the place where the information system is located may be different from the place where the data message is deemed to be received under paragraph 5 of this article.

"4. Unless otherwise agreed by the parties, when the originator and the addressee use the same information system, both the dispatch and the receipt of a data message occur when the data message becomes capable of being retrieved and processed by the addressee.

"5. Unless otherwise agreed between the originator and the addressee, a data message is deemed to be dispatched at the place where the originator has its place of business, and is deemed to be received at the place where the addressee has its place of business, as determined in accordance with article 7."

94. The deliberations of the Working Group were focused on draft paragraph 2, which was criticized for being overly complex and for containing an excessive level of detail. From a substantive point of view, it was suggested that a rule on receipt of data messages that focused on the moment when a data message entered a given information system was said to be excessively rigid and insufficient to ensure that the addressee had actual knowledge of the message. It was said that the fact that a message had entered the addressee's system or another system designated by the addressee might not always allow the conclusion that the addressee was capable of accessing the message. The rule contained in draft paragraph 2 should be rendered more flexible by adding the notion of accessibility of the data message to the elements mentioned in the draft paragraph.

95. One line of thought in that connection was that the rules set forth in the draft paragraph were substantially acceptable, but that the first and the last sentence of the draft paragraph needed further qualification by adding language such as "and the data message comes to the attention of the addressee". Such an addition, it was said, might address situations where the message was not capable of being accessed by the addressee for reasons beyond the addressee's control, such as interruption or unavailability of access by the addressee to the information system.

96. Another line of thought was that it would be preferable to replace the entire paragraph 2, and possibly paragraphs 3-5 as well, with a shorter provision to the effect that a data message was deemed to be received if the message was capable of being retrieved and processed by the addressee.

97. While there was wide and strong support for the latter proposal, the Working Group also heard strong objections thereto. It was pointed out that the entire draft paragraph was based on article 15 of the UNCITRAL Model Law on Electronic Commerce and that care should be taken to avoid inconsistencies between the two texts. As currently formulated, the rules contained in the draft paragraph were felt to replicate, in an electronic environment, the tests used for dispatch and receipt of paper-based communications, namely, the moment when the communication left the sphere of control of the sender and the moment when it entered the sphere of control of the recipient. The notion of "entry" into an information system, which was used for both the definition of dispatch and that of receipt of a data message, referred to the moment when a data message became available for processing within an information system. The rules in the draft paragraph were said to be essentially intended to establish functional equivalence, but not to develop particular rules for electronic commerce. For that reason, it was said to be undesirable to craft the rules on the basis of the time when a message became intelligible or usable by the addressee. Those issues should remain outside the purview of the draft convention. Furthermore, it was said that paragraph 2 contained an important rule allowing the parties to designate a specific information system for receiving certain communications, for

instance, where an offer expressly specified the address to which acceptance should be sent. Such a possibility was said to be of great practical importance, in particular for large corporations using various communications systems at different places.

98. The Working Group considered at length the differing views that were expressed. While a broadly held view was in favour of replacing draft paragraph 2 with a more general rule based on the notion of accessibility of a data message, the Working Group agreed that the matter required further consideration and decided that the current text of the draft paragraph should be kept in square brackets, as an alternative to a new paragraph to be prepared by the Secretariat. In preparing an alternative draft, the Secretariat was requested to include language that broadened the scope of the draft provisions so as to encompass other commercial communications beyond offers and acceptances.

Article 12. Automated transactions

99. The text of the draft article, as considered by the Working Group, read as follows:

"1. Unless otherwise agreed by the parties, a contract may be formed by the interaction of an automated computer system and a natural person or by the interaction of automated computer systems, even if no natural person reviewed each of the individual actions carried out by such systems or the resulting agreement.

"2. Unless otherwise [expressly] agreed by the parties, a party offering goods or services through an automated computer system shall make available to the parties that use the system technical means allowing the parties to identify and correct errors prior to the conclusion of a contract. The technical means to be made available pursuant to this paragraph shall be appropriate, effective and accessible.

"[3. A contract concluded by a natural person that accesses an automated computer system of another person has no legal effect and is not enforceable if the natural person made a material error in a data message and:

"(a) The automated computer system did not provide the natural person with an opportunity to prevent or correct the error;

"(b) The natural person notifies the other person of the error as soon as practicable when the natural person learns of it and indicates that he or she made an error in the data message;

"(c) The natural person takes reasonable steps, including steps that conform to the other person's instructions to return the goods or services received, if any, as a result of the error or, if instructed to do so, to destroy such goods or services; and

"(d) The natural person has not used or received any material benefit or value from the goods or services, if any, received from the other person.]"

General comments

100. Questions were raised as to the practical need for regulating automated transactions specifically. It was stated that the issues regulated in draft article 12 were already, or should be, answered in other draft articles. It was said that, in practice, it might be problematic to distinguish automated transactions from semi-automated and non-automated transactions.

101. The Working Group took note of those views and was mindful of the conceptual difficulties related to the notion of "automated computer system", as used in the draft article, and of the need to avoid formulating rules on errors in an electronic environment that departed from the rules that applied in corresponding situations in a paper-based environment.

Paragraph 1

102. The Working Group noted that the draft paragraph developed further a principle formulated in general terms in article 13, paragraph 2 (b), of the UNCITRAL Model Law on Electronic Commerce. The draft paragraph, it was pointed out, was not intended to innovate on the current understanding of legal effects of automated transactions, as expressed by the Working Group (see A/CN.9/484, para. 106), that a contract resulting from the interaction of a computer with another computer or person was attributable to the person in whose name the contract was entered into.

103. Subject to replacing the words "natural person" with the word "person" and "automated computer system" with "automated information system", the Working Group was of the view that the substance of the draft paragraph was generally acceptable.

Paragraphs 2 and 3

104. The Working Group held an extensive discussion on the need for and desirability of formulating specific rules to address mistakes and errors made by persons when dealing with automated computer systems.

105. There were expressions of strong support for including provisions dealing with errors in electronic transactions. There was a need for such a specific provision in the light of the relatively higher risk of human errors being made in online transactions made through automated information systems than in more traditional modes of contract negotiation. The need for specific provisions was even greater since errors made by the parties in those situations might become irreversible once acceptance was dispatched.

106. The countervailing view was that the provisions under consideration might interfere with well-established notions of contract law and were not appropriate in the context of the new instrument. It was said that the provisions along the lines of draft paragraph 2 and, even more so, draft paragraph 3, carried the risk of creating a duality of regimes on the legal consequences of mistake and error for electronic and non-electronic environments.

107. The prevailing view within the Working Group was that it would be useful to address the issue of errors and mistakes in electronic transactions. For purposes of clarity, such provisions should preferably appear in a separate article of the draft convention. The Working Group then proceeded to consider specific comments that were made in respect of paragraphs 2 and 3.

108. Various speakers expressed the view that draft paragraph 2 was of a regulatory or public law nature and that, as such, it was not appropriate for the draft convention to contain such a provision. Typically, an obligation for persons offering goods or services through automated information systems to offer means for correcting input errors could only be effective if sanctions of an administrative or regulatory nature were provided for non-compliance with such an obligation. As the draft paragraph did not, and by its very nature could not, provide such a system of sanctions, it would be preferable to delete the provision.

109. The countervailing view, which eventually prevailed, was that the draft paragraph was a useful provision to encourage best practices in electronic transactions and that the provision should be retained in the draft convention. Although provisions of that type might be found in consumer protection legislation, the prevailing view within the Working Group was that they could be appropriate in a business-to-business context as well. Furthermore, the draft paragraph could not be regarded as being overly prescriptive since it expressly recognized the parties' freedom to deviate from its provisions. Some of the concerns that had been expressed, it was suggested, could be addressed by reformulating the draft paragraph to express more clearly the logical relationship between draft paragraphs 2 and 3, which established a sanction of a private law nature.

110. With regard to draft paragraph 3, it was suggested that such a provision might not be appropriate in the context of commercial (i.e. non-consumer) transactions, since the right to repudiate a contract in case of material error might not always be provided under general contract law. Adopting a solution along the lines of the draft paragraph might interfere with well-established principles of domestic law. The use of automated information systems alone was not felt to be a sufficient reason to that end. Also, subparagraphs (c) and (d) were felt to go beyond matters of contract formation and depart from the consequences of avoidance of contracts under some legal systems. The prevailing view within the Working Group, however, was that a provision providing a harmonized solution for dealing with the consequences of errors in electronic transactions had great practical importance and was needed in the draft convention. The fact that the provision dealt with the validity of contracts was said to be consistent with draft article 3.

111. Nevertheless, the Working Group considered that the notion of "material error" in the draft paragraph needed to be clarified. Furthermore, the Working Group agreed that a revision of the draft paragraph to be prepared by the Secretariat could provide a second variant of draft paragraph 2 for which some of the substance of subparagraph (a) might be used. It was suggested that subparagraphs (c) and (d) could be combined under another paragraph, as a further alternative for consideration by the Working Group.

Article 13. Form requirements

112. The text of the draft article, as considered by the Working Group, read as follows:

"1. Nothing in this Convention requires a contract to be concluded in or evidenced by writing or subjects a contract to any other requirement as to form.

"2. Where the law requires that a contract to which this Convention applies should be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference.

Variant A

"3. Where the law requires that a contract to which this Convention applies should be signed, that requirement is met in relation to a data message if:

"(a) A method is used to identify that person and to indicate that person's approval of the information contained in the data message; and

"(b) That method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement."

Variant B

"3. Where the law requires that a contract to which this Convention applies should be signed, or provides consequences for the absence of a signature, that requirement is met in relation to a data message if an electronic signature is used which is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

"4. An electronic signature is considered to be reliable for the purposes of satisfying the requirements referred to in paragraph 3 if:

"(a) The signature creation data are, within the context in which they are used, linked to the signatory and to no other person;

"(b) The signature creation data were, at the time of signing, under the control of the signatory and of no other person;

"(c) Any alteration to the electronic signature, made after the time of signing, is detectable; and

"(d) Where the purpose of the legal requirement for a signature is to provide assurances as to the integrity of the information to which it relates, any alteration made to that information after the time of signing is detectable.

"5. Paragraph 4 does not limit the ability of any person:

"(a) To establish in any other way, for the purposes of satisfying the requirement referred to in paragraph 3, the reliability of an electronic signature;

"(b) To adduce evidence of the non-reliability of an electronic signature."

113. It was observed that draft article 13 combined essential provisions on form requirements of the United Nations Sales Convention (art. 11) with provisions of articles 6 and 7 of the UNCITRAL Model Law on Electronic Commerce. Paragraph 1 restated the general principle of freedom of form contained in article 11 of the United Nations Sales Convention. Paragraph 2 set forth the criteria for the functional equivalence between data messages and paper documents, in the same manner as article 6 of the UNCITRAL Model Law on Electronic Commerce. Variant A stated the general criteria for the functional equivalence between handwritten signatures and electronic identification methods referred to in article 7 of the UNCITRAL Model Law on Electronic Commerce. Variant B was based on article 6, paragraph 3, of the UNCITRAL Model Law on Electronic Signatures. It was pointed out that, in contrast with the structure adopted in article 6, paragraph 3, of the UNCITRAL Model Law on Electronic Commerce, possible exclusions of certain fact situations from the scope of draft article 13 were not dealt with by way of a general provision in that draft article. Such possible situations where traditional form requirements might need to be maintained were intended to be dealt with under draft article 2. The view was expressed that a different approach should be taken, by way of a reproduction in the draft instrument of article 96 of the United Nations Sales Convention. It was generally felt, however, that creating a possibility

for contracting States whose legislation required contracts to be concluded in or evidenced by writing to make a declaration to the effect of avoiding application of the more liberal rule embodied in draft article 13 would be excessively complex. It was agreed that the matter might need to be further discussed in the context of draft article 2.

Paragraph 1

114. While the policy on which paragraph 1 was based met with wide approval, doubts were expressed as to the usefulness of expressly stating in the draft convention a rule that, in the view of a number of delegations, merely restated the obvious, duplicated certain provisions of draft articles 10 and 12 and provided little harmonizing effect. The view was expressed that paragraph 1 would serve a useful purpose if it were to be interpreted as confirming that it was up to domestic legislation to establish general form requirements regarding contract formation. Support was expressed in favour of that interpretation, which was said to confirm that it was unnecessary to resort to a declaration mechanism such as the one created by article 96 of the United Nations Sales Convention.

115. The prevailing view, however, was that paragraph 1 was useful and should be retained in square brackets, pending further consideration by the Working Group at a later stage. As a matter of drafting, doubts were also expressed regarding the merit of reproducing part of article 11 of the United Nations Sales Convention. It was pointed out that the reference to "writing" in that Convention was understandable since it had been drafted at a time when writing was the main form requirement likely to be imposed in contract-making. It was suggested that the draft instrument should instead adopt a formulation more in line with current contractual practices along the lines of "nothing in this Convention requires a contract to be concluded or evidenced [in a particular form] [by data messages or in any other form]". After discussion, the Working Group agreed that the suggested wording should be reflected in a future redraft of paragraph 1.

Paragraph 2

116. The substance of paragraph 2 was found generally acceptable. Questions were raised regarding the exact meaning of the reference to "the law", which might require a contract to be in writing, and also regarding the meaning of the words "in writing". It was suggested that those issues might need to be discussed further in the context of draft article 5. The suggestion was noted by the Working Group.

117. The view was expressed that, while the result expected from paragraph 2 could also be reached through interpretation of existing domestic law, more serious difficulties might stem from writing requirements contained in multilateral instruments. It was observed that the matter might need to be discussed further in the context of item 5 of the agenda.

Paragraph 3

118. Support was expressed in favour of either variant A or B. In favour of variant B, it was pointed out that the text was more detailed and more apt than variant A to provide legal certainty with respect to the use of electronic signatures. In support of variant A, it was stated that the text contained a more flexible provision than variant B, that it could more easily be made consistent with the stricter requirements that might exist in domestic legislation regarding the characteristics of an electronic signature and that it was more reflective of the principle of technology neutrality.

119. A widely shared view was that variant A should be retained, pending future discussion regarding the definition of "data message" in draft article 5. It was stated that the minimal harmonization that could be expected from variant A was sufficient to reduce the risk linked with the application of foreign electronic signature legislation. Another view was that neither of the variants was necessary if the main purpose of the draft instrument was to deal with contract formation. It was stated by its proponents that this view might be reconsidered if the Working Group decided that an important purpose of the draft instrument was to provide a version of the UNCITRAL Model Laws on Electronic Commerce and on Electronic Signatures in the form of a convention. Yet another view that gathered some support was that the two variants could be combined, with variant A applying as the smallest common denominator where States had already adopted electronic signature legislation and variant B applying where no such domestic legislation existed. It was pointed out in response that such a combination

would result in undesirable duality of the legal regimes applicable. Furthermore, it was observed that combining the two variants would amount to adopting variant B, which reproduced and built upon the text of article 6 of the UNCITRAL Model Law on Electronic Commerce reproduced as variant A.

120. As a matter of drafting, it was pointed out that, should variant A be retained, words along the lines of "or provides consequences for the absence of a signature" should be inserted. With respect to both variants, it was pointed out that the reference to legal requirements with regard to "a contract" was too restrictive and should be extended to cover also pre- and post-contractual "communications", "statements" or "manifestations of will" between the parties using data messages.

121. After discussion, the Working Group did not reach agreement regarding either of the variants. The Secretariat was requested to prepare a revised version of draft article 13, with possible alternative wordings, taking into account the various views and suggestions that had been expressed.

Article 15. Availability of contract terms

122. The text of the draft article, as considered by the Working Group, read as follows:

"A party offering goods or services through an information system that is generally accessible to the public shall make the data message or messages which contain the contract terms and general conditions available to the other party for a reasonable period of time in a way that allows for their storage and reproduction. A data message is deemed not to be capable of being stored or reproduced if the originator inhibits the printing or storage of the data message or messages by the other party."

123. The view was expressed that, for reasons expressed in the context of the discussion regarding draft articles 14 and 12, draft article 15 should be deleted. It was stated that it was pointless to establish regulatory provisions in the draft instrument, in particular if no sanction was created. In favour of deletion, it was also stated that draft article 15 would result in imposing rules that did not exist in the context of paper-based transactions, thus departing from the policy that the draft instrument should not create a duality of regimes governing paper-based contracts on the one hand and electronic transactions on the other. The widely prevailing view, however, was that the general policy embodied in the draft article should be retained, since it addressed specifically an element that was particularly important in the context of electronic contracts. It was agreed that further consideration might be needed in respect of the consequences of non-compliance with draft article 15. Possible consequences such as the nullity of the contract or the non-incorporation of the general terms and conditions in the contract were mentioned.

124. With respect to the formulation of draft article 15, it was suggested that the words "for a reasonable period of time" should be deleted since the obligation to make the general conditions available to the public should not be limited in time. With respect to the last sentence, doubts were expressed as to whether such a "deeming" provision was sufficiently flexible to allow for the creation of "original" or "unique" electronic documents, which might sometimes be obtained through inhibition of the capacity of reproducing the electronic document. It was also suggested that further discussion might be necessary to determine whether the second sentence was needed in view of the requirement contained in the first sentence of the draft article, which would simply not be met in the situation considered under the second sentence.

125. After discussion, the Working Group requested the Secretariat to prepare a revised version of draft article 15, based on the above discussion, to be placed between square brackets for continuation of the discussion at a future session.

Notes

[1] United Nations, *Treaty Series*, vol. 1489, No. 25567.

[2] *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17* (A/55/17), paras. 384-388.

[3] Ibid., *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 293.

[4] Ibid., para. 295.